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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 740

ELLA V FORE,
Appellant,

v.

JAKOBINE TOTH,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM.

CHARLES C. REDMOND,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5947

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In the Supreme Court of the United States

OCTOBER TERM, 1958.

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ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM.

Now comes Jakobine Toth, the Appellee, and pursuant to Rule 16 of the Revised Rules of the Court, moves that the Court dismiss this Appeal upon the following grounds:

1. The Appeal is not within the jurisdiction of this Court.

2. The Appeal does not present a substantial Federal question.

3. The Federal question sought to be raised has been expressly passed on.

4. The judgment sought to be appealed rests upon an adequate nonfederal basis.

STATEMENT OF THE CASE

Ella V. Fore, the Appellant herein, is 78 years of age, lives alone in Winnsboro, Louisiana, and is in poor health (R. 18-22-23). She has no relatives that live near and her sole means of livelihood is a government allotment in the amount of Sixty Dollars ($60.00) per month and a gratuity from her daughter in the amount of One Hundred Dollars ($100.00) per month (R. 21-22). The Appellee, Jakobine Toth, age 33 years, is married, in good health, and lives with her husband in Cleveland, Ohio, in a home owned by them. She is the child's maternal aunt. In addition to the child, Donald Peter Fore, who is the subject of this action, Mrs. Toth and her husband are the natural parents of another child, a boy now three years of age (R. 57-59).

On September 10, 1957, the Appellee's sister and brother-in-law, Mr. and Mrs. Donnie Fore, were killed in an automobile crash in Ingrandes, France, leaving as their sole survivor their only son, Donald Peter Fore, aged three years. Mrs. Fore survived her husband for a period of five hours (R. 70-72). Subject child's father, Donnie Fore, lived with his parents in Louisiana until he entered the United States Military Service in 1941. From that time to the date of his death, he had been in the United States Military Service stationed for the most part in Europe (R. 159-160). He owned no property in Louisiana (R. 32). The mother of subject child was born and raised in Germany and was married to her husband, Donnie Fore, in 1952. Excepting for a period of three years from 1952 to 1956 when she and her husband and subject child were living in Colonial Heights, Virginia, they had spent all their married life with their child in Europe (R. 34). The child's parents stored their furniture in Virginia in 1956 when they returned to Europe for Donnie Fore's further assignment in the military service. He had ex-

pressed his desire and intention, to others, of making his home in Virginia when his last term of enlistment in the United States Military Service was ended (R. 164-166). After their death, their sole surviving child, Donald Peter Fore, was orphaned and homeless in a strange land. The Appellee, his maternal aunt, immediately flew over to Europe to get him and was successful in obtaining his release to her custody from the United States military authorities in France on October 25, 1957 (R. 73-74). Thereafter, she and subject child stayed at her parents' home in Germany for an additional three weeks, and then departed for her home in Cleveland, Ohio (R. 74). When they arrived in New York en route to Appellee's home, she was required to answer to a petition for writ of habeas corpus, on November 19, 1957, filed in the Supreme Court of New York, Queens County, by one Ida Fore Tillery, a paternal aunt, of Amite, Mississippi, who had previously obtained letters of guardianship from a Mississippi court (R. 77-79). After the hearing in the New York court, the orphaned minor and the Appellee proceeded to her home in Cleveland. On November 25th, the New York Supreme Court denied the writ and awarded legal custody of the child to the Appellee (see Respondent's Exhibit 3) (R. 78-79).

He has lived with Appellee and has been maintained and cared for by her since October 25, 1957, up until the present date, and on December 2, 1957, pursuant to application properly filed, the Probate Court of Cuyahoga County, Ohio, wherein the Appellee was domiciled and the child was residing, granted letters of guardianship awarding the custory of subject child to this Appellee (R. 85).

Pursuant to application for letters of guardianship (tutorship) filed in April, 1958, the Appellant was

awarded guardianship custody of subject child on April 11, 1958, by a Louisiana court (R. 32). Neither the minor child, Donald Peter Fore, nor his mother have ever lived in Louisiana (R. 34-35). His father had not actually lived in Louisiana for a period of seventeen years prior to his death. This child did not own property in Louisiana nor was he at any time within the Louisiana court's jurisdiction at the time the application for tutorship was filed or appointment made pursuant thereto (R. 32-35).

THE FEDERAL QUESTIONS SOUGHT TO BE RAISED HAVE BEEN EXPRESSLY PASSED ON.

The Appellant in her jurisdictional statement has presented four questions in her appeal. The first two of such questions are substantially the same, in that she claims that the Supreme Court of Ohio violated the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1, by failing to give credit to the Louisiana decree of tutorship.

If the Ohio Probate Court had jurisdiction to make the guardianship appointment for Donald Peter Fore, then the Full Faith and Credit clause certainly has no application here, since the guardianship decree in Ohio was issued several months prior to the Louisiana tutorship (guardianship). On the contrary, if applicable at all, it was the Louisiana court that was bound to give Full Faith and Credit to the Ohio Probate Court decree. Jurisdiction of the Ohio Probate Court is plenary and exclusive. *Shroyer, Grdn. v. Richmond,* 16 Ohio St. 455; *In re Clendening,* 145 Ohio St. 82, 16 N. E. 2d 676.

The facts are undisputed that when the child, age three years, was orphaned by the tragic death of his parents, he was homeless until the United States military authorities in France surrendered his actual custody to

the Appellee on October 17, 1957, and with whom he has been living up to the present. For a period of approximately twelve days prior to Appellee's appointment as his guardian on December 2, 1957, the minor had resided at the Appellee's permanent home in Cleveland, Ohio.

Neither the child nor his mother had ever lived in Louisiana. If it could be conceded that the minor had a technical legal domicile in Louisiana by reason of his father having lived there when he entered the Military Service seventeen years prior to his death, then what happened to that domicile when the child's parents were killed? He being a minor of tender years, he had no power to select his domicile. The Appellee did not take the child from anyone who had even a remote right to his custody. None of his relatives from either side of the family went over to Europe to get him. Did not this Appellee who stood *in loco parentis* have the power to change his domicile? She is the child's maternal aunt. Section 2151.06 of the Ohio Revised Code states that a child has the same domicile or legal residence as the parents or legal guardian of his person, *or his custodian who stands in the relation of loco parentis.* Loco parentis is a status requiring factual determination. *Layerly v. United States,* 162 Fed. 2d 79; *Dix v. Martin,* 171 Mo. App. 266, 157 S. W. 133, 135; *Kransky v. Glen Alden Coal Co.,* 354 Pa. 425, 42 A. 2d 645, 647; *Corpus Juris Secundum,* Parent and Child, Section 71, notes 60, 61 and 62. *Grandparents as such do not stand in loco parentis to their grandchildren. Sutton v. Menges,* 186 Va. 805, 44 S. E. 2d 414. If a grandparent is *actually* raising a child, then he stands *in loco parentis.* If an aunt is *actually* raising a child, then *she* stands *in loco parentis* to that child. If his residence with Appellee who provided for his care, shelter and support for the several months following the death of his par-

ents was sufficient to change his technical legal fiction of domicile from Louisiana to actual domicile in Ohio at the Appellee's home, then certainly the Louisiana tutorship in April, 1958, was invalid since that court would be without jurisdiction to make such a decree. If that be the case, the Full Faith and Credit clause would not apply. If the child's domicile was Ohio in April, 1958, then the Louisiana tutorship was just as invalid as the Mississippi guardianship of Ida Fore Tillery, the child's paternal aunt, which appointment was made without the child or either of its parents ever having lived in Mississippi and without the child ever being within that court's jurisdiction.

It is submitted, however, that domicile is not necessary to a court's jurisdiction to appoint a guardian for a minor. Only the child's presence or, at most, residence in the court's jurisdiction is required. Sections 2111.02 and 2151.06 of the Ohio Revised Code; *Langan v. Kessinger*, 23 Ohio Law Abs. 392; *In re Murray*, 4 O. N. P. (N. S.) 233; 168 Ohio St. 363, Vol. 31 *Ohio Bar* dated December 29, 1958; *Finlay v. Finlay*, 240 N. Y. 429, 148 N. E. 624; *Wick v. Cox* (1948) 146 Texas 489, 208 S. W. 2d 876; *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 33 N. E. 2d 467; *Stearns, Admr. v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441; *Rizo v. Burruel*, 23 Ariz. 137, 202 P. 234, 19 A. L. R. 823; *Taylor v. Collins*, 172 Ark. 541, 289 S. W. 466; *Appeal of Woodward*, 81 Conn. 152, 70 A. 453; *Hopkins v. Gifford*, 309 Ill. 363, 141 N. E. 178; *Kenner v. Kenner*, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587; *Sheehy v. Sheehy*, 88 N. H. 223, 186 A. 1, 107 A. L. R. 635; *White v. White*, 77 N. H. 26, 86 A. 353; *Goldsmith v. Salkey* (Tex. Civ. App.) 115 S. W. 2d 778; and 4 *A. L. R.* 2d, p. 16 (in which there are a great many other cases cited in support of this principle). Since mere residence of a dependent child gives a court jurisdiction

over it, then why must the Supreme Court of Ohio be required to ignore the guardianship decree by the Probate Court of Cuyahoga County, Ohio, which was made more than four months prior to the Louisiana decree.

Perhaps Appellant contends that even though mere residence of a child within a court's jurisdiction is sufficient for such court to appoint a guardian for it, such appointment is inferior to a subsequent appointment by a court of its domicile, and therefore Full Faith and Credit is applicable. Should it be conceded that Louisiana was the minor's domicile, it must be remembered that the Louisiana decree was entered without jurisdiction over the person of the respondent or the child. Therefore, the Supreme Court of Ohio is not required to give such credit to the Louisiana decree of tutorship as will preclude it from giving any effect to the order of the Probate Court of Cuyahoga County, Ohio. *May v. Anderson*, 345 U. S. 528, 97 L. Ed. 1221, 73 Sup. Ct. 840; *Cunningham v. Cunningham*, 166 Ohio St. 203, 141 N. E. 2d 172; *New York ex rel. Halvey v. Halvey*, 330 U. S. 610, at p. 615.

On the question of Full Faith and Credit, this Court has expressly ruled in *Halvey v Halvey*, 330 U. S. 615. "that the state of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it is rendered." No notice of the Louisiana appointment was given either to the child or the Appellee with whom he was living. Both were outside the State of Louisiana when that tutorship award was made. Therefore, Ohio is not bound to give Full Faith and Credit to the Louisiana decree. *May v. Anderson*, 345 U. S. 528; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. Where "Full Faith and Credit" has been denied because (1) the child was not in the jurisdiction (2) the child was not in the physical possession of the guard-

ian, or (3) where there was no jurisdiction over the person who had the child, see *Kline v. Kline*, 57 Iowa 386, 10 N. W. 825; *Commonwealth ex rel. Rogers v. Daven, et al.* (1930), 298 Pa. 416, 148 A. 524; *Graham v. Graham et al.* (1951), 367 Pa. 553, 80 A. 2d 829; *Gilman v. Morgan* (1947), 158 Fla. 605, 29 S. 2d 372; *Black v. Black* (1924), 110 O. S. 392, 144 N. E. 268; *Estin v. Estin* (1948), 334 U. S. 541, 1 A. L. R. 2d 1412. Appellee further contends that custody awards of minor children is a *personam* action. Since the child who is the subject of this action was never in the jurisdiction of the Louisiana court when that appointment was made, such court was without jurisdiction to make the tutorship award and, therefore, the Appellee and said child were immune to any extention of "Full Faith and Credit" to said purported award, it being repugnant to the guarantee of Section 1 of the Fourteenth Amendment of the Constitution of the United States. The judgment sought to be appealed rests upon an adequate nonfederal basis and is not within the jurisdiction of this Court.

In her third Federal question, the Appellant claims that her right of procedural due process law was denied when the Supreme Court of Ohio decided its case with no bill of exceptions before it.

In the opinion and decision, the Ohio Supreme Court said that the bill of exceptions in this instance was not necessary because enough facts were in the Court of Appeals Entry. In such Court of Appeals Entry, the Court said that the case was heard on "the presentations and allegations of the parties being heard and considered, a transcript of testimony taken before a Master Commissioner appointed by this Court and the memoranda of law submitted by the parties hereto, the Court finds * * * etc." The lower court having based its decision on the

transcript of testimony, then such transcript became a part of the record of the case subject to review by the Ohio Supreme Court, and therefore it was unnecessary to have a bill of exceptions in this matter. Since the transcript of testimony was a part of the record in the case and therefore before the Ohio Supreme Court, it had adequate facts upon which it based its conclusions. The law in Ohio has always been well settled that where the decisions of trial is carried into the transcript and exemplifies the errors assigned or where the error is apparent from the record and entries of the trial court, a bill of exceptions is not necessary. *Byrd v. Engles,* 76 Ohio Law Abs. 355; *Bailey v. Progressive Motor Sales,* 101 Ohio App. 173, 138 N. E. 2d 433; *Schwartz v. Sandusky City Savings & Loan,* 65 Ohio App. 437, 30 N. E. 2d 556; Section 2321.12 of the Ohio Revised Code. When no bill of exceptions has been filed, the reviewing court is limited to a review of the record, the pleadings, journal entry and original papers. *Central National Bank v. Newton Steel,* 61 Ohio App. 57, 22 N. E. 2d 428; *Univis Lens v. U. E. W.*, 85 Ohio App. 55, 86 N. E. 2d 802. It is submitted that the Supreme Court of Ohio is capable of interpreting its own statutory law insofar as procedure is concerned.

There is nothing in the Court of Appeals Entry that indicates that it considered any evidence not appearing in the transcript of testimony taken before a master commissioner appointed by that court. Such entry was prepared by Appellant's counsel. Neither the Court of Appeals nor the Appellant has at any time claimed that the court's decision was based on any evidence not appearing in the transcript of testimony. Such transcript shows no disagreement as to the facts involved. Therefore, the evidence appearing in the transcript of testimony is tantamount to an agreed statement of facts which would also eliminate the

necessity of a bill of exceptions under authority of Section 2321.12 of the Ohio Revised Code.

The Appellant for her fourth question claims that the Ohio Supreme Court denied her procedural due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, by failing to rule on Appellant's Motion to Strike from Brief of Appellee.

Counsel for Appellee was retained to represent her just the day before the trial in the Ohio Court of Appeals. No transcript of the minutes of the hearing before the New York Supreme Court on November 19, 1957, involving this custody issue, was available at the time of the trial in Ohio. Only Respondent's Exhibit 3 showing the denial of the writ and award of custody to Appellee by the New York court was admitted in evidence by Appellee in the Ohio trial. The Ohio appellate court's (trial court) judgment (two to one decision) was adverse to the Appellee. Shortly thereafter, she filed a Motion to Stay Execution of Judgment in the Ohio Supreme Court pending review, in which she stated that the New York Supreme Court denied the paternal aunt's writ and awarded custody to this Appellee. The Appellant, in opposing said Motion, wrote a letter or brief to the Ohio Supreme Court (Appendix C herein), in which, on page 1, the last full paragraph (p. 15, *infra*), denied that the New York court had awarded custody to Appellee, and stated further that the New York court had denied the writ of habeas corpus filed by the paternal aunt on the basis that the Mississippi judgment was void in that such court had no jurisdiction to appoint a guardian. That was an extrajudical statement never offered in evidence in the trial court. Thereafter, the Appellee obtained the Minutes of the New York hearing which proved that the extrajudicial statement by Appellant was false, and so attached the Minutes of the New York hearing to her brief.

Where a litigant makes an evidentiary statement to a reviewing court which is not in evidence, may not the answering litigant offer proof to the same court that such evidentiary statement is false?

Since the Ohio Supreme Court did not rule on Appellant's aforementioned Motion, it is unknown whether that court considered the Minutes of the New York hearing which was attached as Appendix A to Appellee's brief filed therein. Is one permitted to speculate on the Ohio Supreme Court's consideration of Appellee's said Appendix A? That Court's opinion does not disclose any more than appears in Respondent's Exhibit 3; therefore, how can it be shown that procedural due process was lacking?

FEDERAL QUESTIONS SOUGHT TO BE RAISED ARE NOT SUBSTANTIAL.

Appellee respectfully submits that the claimed Federal questions are not substantial. Donald Peter Fore, the minor child, had never lived in Louisiana, was never cared for or maintained by Appellant, and was not within the Louisiana court's jurisdiction at the time of Appellant's appointment as tutrix. On the contrary, since October 25, 1957, following the death of his parents in September, 1957, he had lived continuously with Appellee who is domiciled in Cleveland, Ohio. He was not removed by Appellee from the residence of anyone else who was even remotely interested in him. Could not his domicile be then in Ohio at the time of the Louisiana tutorship appointment on April 11, 1958? The Appellant had expressed no desire or request to gain possession of the child until seven months after the death of the child's parents. The Ohio Supreme Court did not state that the child's domicile was not in Ohio. It merely stated that even if the Appellant's claim of Louisiana domicilliary was true, the Ohio Probate

Court had personal jurisdiction over the child at the time of its guardianship decree which was prior to the Louisiana decree. This Court is not a fact-finding tribunal.

On the question of "Full Faith and Credit," this Court has expressly ruled in *Halvey v. Halvey*, *May v. Anderson* and *Pennoyer v. Neff*, that "the state of the forum has at least as much leeway to disregard the judgment, to qualify it or to depart from it as does the state where it is rendered."

It is submitted that the Ohio Supreme Court did not decide in this case any Federal question of substance not theretofore determined by this Court, nor has the state court decided any question which is in any way not in accord with the applicable decisions of this Court. No real or substantial Federal question is involved in this appeal and, therefore, the Motion of the Appellee to dismiss the appeal or affirm the Ohio Supreme Court decision should be granted.

Respectfully submitted,

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Attorney for Appellee.

APPENDIX A.

Ohio Revised Code Section 2151.06.

Sec. 2151.06. Residence or legal settlement.

Under sections 2151.01 to 2151.54, inclusive, of the Revised Code, a child has the same residence or legal settlement as his parents, legal guardian of his person, or his custodian who stands in the relation of loco parentis.

APPENDIX B.

Ohio Revised Code Section 2321.12.

Sec. 2321.12. Disposition of bill of exceptions.

It is not necessary to make an entry upon the journal of the court of the settling, allowance, and signing of a bill of exceptions. The signature of the trial judge, or the other judge acting for him, in allowing, settling, and signing it is sufficient evidence of such fact. The signature of such judge may be dispensed with by agreement of the parties and when all the parties, individually or by their attorneys of record, stipulate that the bill of exceptions is a true bill of exceptions, it shall be filed and considered as such without the signature of the judge. In cases tried in courts of record the certificate of the official court reporter attached to the transcript of the testimony is sufficient verification of the bill and the signature of the judge is not necessary, unless within ten days after notice to the adverse party of the filing of such bill, said adverse party files objection or amendment to such bill, in which case said bill shall be submitted to the court for settlement as provided in sections 2321.06 to 2321.10, inclusive, of the Revised Code. A bill is not necessary in a case in which the entry of judgment shows that the case was tried on an agreed statement of facts and such agreed statement was filed with the papers in the case.

APPENDIX C.

Appellee's Brief Filed in Ohio Supreme Court.

(Filed July 30, 1958.

McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett

Law Offices
Cleveland

The Supreme Court of Ohio
Columbus, Ohio

Re: Ella V. Fore, Petitioner-Appellee v. Jakobine Toth, Respondent-Appellant.

Your Honors:

This is written in response to and comment upon the "Brief" attached to Respondent-Appellant's "Motion For Stay Of Execution Of Judgment" in the above matter now on appeal to this Court from the Court of Appeals of Cuyahoga County; a brief in opposition to such anticipated Motion has been filed by us with the Supreme Court.

In Respondent's brief it is stated that Mrs. Fore, the Petitioner, is in "poor health." This is not borne out by the record. As the Court of Appeals said in its Opinion at pages 3 and 4 attached to our brief in opposition to the Motion:

> "There has been as yet no contest as to what is for the best interests of the child, nor could such question be litigated in this state on the undisputed facts here presented. Does the respondent suggest that the state of the child's domicile, Louisiana, is incapable of seeing to its welfare? Does the respondent seek, should disaster again strike, to burden this state with the continued care of the child or should she then attempt to surrender his custody to the state of his domicile? The suggestion that the relator, being seventy-seven

years of age, is incapable of caring for the child, is not supported by the record in this case. The facts are that Ella Fore has raised nine children and one grandchild, some of whom have had very acceptable army careers."

Nor did the New York Court "award custody" of the child to Mrs. Toth. It simply refused to grant the writ of habeas corpus filed by the paternal aunt on the basis of a Mississippi judgment which was equally as void as the judgment of the Probate Court of Cuyahoga County. Neither state had any jurisdiction to appoint a guardian.

For reasons pointed out in our brief in opposition to this Motion the Petitioner, Mrs. Fore, was immediately and is now entitled to the custody of the child. No conceivable hardship can come to the child in carrying out the thoroughly considered judgment of the Court of Appeals, nor indeed in law can it be otherwise.

Respectfully submitted,

MAURICE F. HANNING,
KING ROSENDALE.